

**TITLE 16. PROFESSIONAL FIDUCIARIES BUREAU  
DEPARTMENT OF CONSUMER AFFAIRS  
EMERGENCY ADOPTION OF DIVISION 41  
(Commencing with Section 4400)**

**EXPRESS FINDING OF EMERGENCY**

Senate Bill 1550 (Figueroa, Chapter 491, Stats. 2006) created the new Professional Fiduciaries Bureau (Bureau) within the Department of Consumer Affairs (Department). The Bureau is required to license and regulate specified fiduciaries under the Professional Fiduciaries Act (Act) that represent a particularly vulnerable consumer population. Professional fiduciaries provide management services to incapacitated seniors, disabled persons, children and others for personal and financial affairs. The new law prohibits a superior court from appointing a person as a professional fiduciary on or after July 1, 2008 unless the fiduciary is licensed. (Probate Code Section 2340). Therefore, regulations must be immediately adopted so that professional fiduciaries can continue representing and protecting this vulnerable consumer population come July 1, 2008.

Without timely licensure, many infirmed consumers will be unable to secure services from private fiduciaries to manage their daily living needs. This could be a disaster for individuals who are unable to make decisions regarding their own course of care and treatment or who are unable to understand and manage their personal financial responsibilities. Without timely licensure many of these consumers may have to rely upon family members who lack the appropriate skills or who face potential conflicts with siblings or other relatives, or, these consumers may be forced to hire unskilled workers exposing them to potential negligent care or to individuals that could easily abuse their position of authority and trust and endanger their health and well being.

To avoid exploitation of the valued consumers that SB 1550 was intended to protect regulations must be immediately adopted so that there are guaranteed services available come July 1, 2008. Specifically, the Bureau must immediately adopt a Code of Ethics so that the required licensing examination can be developed and must immediately specify the education criteria so that licensing candidates are timely notified of the pre-licensing education mandates so they can meet the qualifications for licensure before the deadline. Therefore, the Bureau finds that the immediate preservation of the public's health, safety, and welfare requires the emergency adoption of these proposed regulations.

The Bureau's basis for this finding is as follows:

- SB 1550 prohibits a court from appointing a private fiduciary without licensure on or after July 1, 2008. (Probate Code Section 2340). In order to meet the mandates of the Act the Bureau must immediately adopt a Code of Ethics and promulgate the necessary education requirements for licensure.
- The Code of Ethics must be adopted immediately so that it can be incorporated into the examination, which must be immediately developed and offered early next year. It is

important to give all potential licensees an opportunity to test and retest in time to pass the exam and become licensed before July 1, 2008.

- The Bureau must immediately adopt the specific education mandates so applicants can earn the 30 hours of education credits required for licensing before the deadline. Immediate education regulations will notify applicants in advance of approved providers and approved courses that will qualify for licensure.
- Immediate effective regulations for the Code of Ethics and education requirements of the Act will give applicants a fair opportunity to meet the licensing application requirements prior to July 1, 2008 without suffering undue hardship. Temporary or permanent closures of private fiduciary businesses may result from lack of timely compliance with the Act and will be harmful to many consumers, including seniors, disabled persons, and children, leaving them without critical health and safety services. A practicing professional fiduciary regularly makes important life-altering decisions on behalf of consumers. It is imperative that good-standing fiduciaries retain the ability to make decisions regarding the necessary courses of care, treatment, and medical services for these consumers without any unnecessary delays or interruptions.
- It would be detrimental to the marketplace to lose businesses, owned and operated by private fiduciaries that would otherwise qualify for licensing but have not timely complied with the Act – exposing them to financial hardships causing business losses and some business closures. This could decrease the already predicted small size of the licensing population at a time when the consumer need is rising with the increasing senior population.
- It is an emergency to adopt these regulations in order to provide for the timely adoption of the Bureau's licensing program to regulate professional fiduciaries to protect the public health, safety, and welfare.

## **STATEMENT OF SPECIFIC FACTS SHOWING THE NEEDS FOR IMMEDIATE ACTION**

SB 1550 (Figueroa, Chap. 491, Stats. 2006) created the Professional Fiduciaries Bureau (Bureau) to license professional fiduciaries, including private conservators, guardians, trustees, and agents under durable power of attorney for health care and finances. The Legislature declared that the system for conservatorships in California is significantly underperforming and, as a result, harming conservatees and their loved ones (Senate Rules Committee, Floor Analysis, August 31, 2006). The problem is expected to compound as California's senior population grows. According to the findings of SB 1550, the number of California's population 65 years of age or older will grow from 3.6 million people in the year 2000, to 6.2 million people in the year 2020, an increase of 72 percent.

As stated in the legislation, professional fiduciaries are not adequately regulated presently. This lack of regulation can result in the neglect or the physical, emotional or financial abuse of the vulnerable clients that professional fiduciaries are supposed to serve. Unless there is a strengthened accountability, abuses of people who are unable to take care of themselves or their property will increase. Therefore, the creation of a program to license and regulate professional fiduciaries is necessary to protect the public health, safety, and welfare. (SB 1550, SECTION 2)

Under SB 1550, the courts are prohibited from appointing private fiduciaries on or after July 1, 2008 unless they are licensed. The proposed regulation will enable private fiduciaries to become licensed

in time. Specifically, the proposal will adopt a Code of Ethics, which is needed immediately to develop the examination, and will specify the education criteria, which is also needed immediately for the examination development process and to give applicants sufficient notice to timely meet the 30 hours of precensing requirements for licensing.

To begin with, the legislation requires passage of an examination for licensing. Since no examination currently exists one must be developed. The examination development process will be time consuming; it will involve doing an occupational analysis to identify core competencies, appointing an examination committee and holding committee meetings to obtain a ranking of core knowledge that California fiduciaries should possess. This will be accomplished by way of a survey of over 2000 California fiduciaries, including those private fiduciaries listed on the Department of Justice's Registry, members of the Professional Fiduciaries Association of California (PFAC), and California members of the National Guardianship Association. The examination committee will write over 300 questions in specific areas of California law, such as professional practices and ethics, fiduciary law and process, financial management, and health care decision making. The final stage of the examination development will involve "beta" testing of the questions. This process will result in the modification of questions, testing of the timing standards for question responses, and it will ensure that the test is representative of the population of persons that need to be tested.

Even considering expertise in examination development, it would not be uncommon for it to take over a year to develop a professional examination given the multitude of tasks involved. In order to comply with the legislative deadline, the Bureau researched the marketplace to identify expertise in this area so that the test could be developed and completed in an expedited manner. In its research, the Bureau has discovered a way to meet the legislatively mandated deadline by contracting with the Center for Guardianship Certification<sup>1</sup> (CGC) for the examination development and maintenance. The CGC has expertise in this area; they developed and maintain mandatory tests in other states, including Florida and Texas, they work with many states (including California until the passage of SB 1550), in offering voluntary certification that involves the passage of an examination, and over many years, CGC has done extensive surveying in identifying core competencies in fiduciary management for different state examinations.

CGC has indicated that they could offer these services to the Bureau and timely complete the examination development phase. The content of the examination though is dependent upon the adoption of the Code of Ethics and the establishment of the education criteria.

Furthermore, for the administration of the exam, the legislation states that the examination shall be offered electronically. In researching different options for electronic delivery of the examination the best option would be to have CGC work directly with the Department of Consumer Affairs' (Department) Computer Based Testing vendor to administer the examination.

With the immediate adoption of the Code of Ethics and the education mandates the Bureau is hopeful that the examination can be offered to licensing candidates beginning in March 2008. This would give applicants a fair opportunity to test and retest to qualify for licensure by July 1, 2008.

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<sup>1</sup> The Center For Guardianship Certification was created in 1994 as an allied foundation of the National Guardianship Association to enhance the quality of guardianship services through national certification.

Under a separate proposed regulation that the Bureau is drafting, examinees will be able to take the examination a total of five times within a 12-month eligibility period not to exceed one examination attempt every 30 days. Under the best case scenario, this would give eligible candidates an opportunity to begin testing in March and give them until June to pass the exam.

As noted above, the consequences of not passing the examination and becoming licensed by July 1, 2008 are tremendous. Existing clients could be left without appropriate representation and other needy consumers could be left without services to manage their health and financial affairs. Therefore, it is necessary to pass emergency regulations to immediately adopt a Code of Ethics and establish the education criteria. This will protect the public health, safety, and welfare.

Next, education standards must be adopted immediately. It is necessary to give candidates sufficient advance notice of the education requirements so that they are able to comply in time for licensing. The education criteria will also be considered in the examination development process.

In the legislation applicants must complete 30 hours of prelicensing education courses approved by the Bureau (Business & Professions Code Sections 6533, 6538). The proposed regulations define approved courses. It is necessary to immediately adopt these regulations so candidates have sufficient time to meet the education requirements for licensure before July 1, 2008.

In addition to the Code of Ethics and the education mandates of the program, candidates also need sufficient time to meet the other requirements for licensure before the deadline.

Without the immediate adoption of these proposed regulations there is a great potential for consumer harm. As mentioned above, professional fiduciary services are critical involving the management of matters related to personal care, housing, medical and financial services for seniors, disabled persons, and children. Without immediate action, some professional fiduciary businesses would be forced to close, limiting services to consumers. With the low estimate of the licensing population, 600 to 1,000, and the rising senior population, there is a need to encourage growth of fiduciary services available to consumers, not to decrease the size of the marketplace.

The Bureau is cognizant of the provisions that require agencies to assess the impact that the proposed regulation may have on the applicable marketplace. The Bureau has determined that the education regulation will increase opportunities for education providers and instructors. The Bureau has also determined that the Code of Ethics regulation will improve the quality of services available to the public. This will have the impact of increasing the quality of life for many consumers struggling with aging challenges, including medical and social. Finally, the proposed regulation will protect the public health, safety, and welfare.

## **AUTHORITY AND REFERENCE**

Pursuant to the authority vested by section 6517, and to make specific and interpret sections 6518, 6520, 6533, 6535, 6538, 6540, 6541 of the Business and Professions Code, the Professional Fiduciaries Bureau proposes the immediate adoption of Articles 3 and 4 of a new Division 41 of Title 16 of the California Code of Regulations, as follows:

## **INFORMATIVE DIGEST/PLAIN ENGLISH POLICY STATEMENT OVERVIEW**

Prior to the enactment of SB 1550, the practice of professional fiduciaries, as defined as professional conservators, guardians, trustees, and agents under durable powers of attorney for health care and finances under the Act, was loosely regulated. The Department of Justice currently maintains a Statewide Registry of private conservators, guardians, and trustees, which acts as a clearinghouse of information for the courts to access when considering court appointment of fiduciaries. This Registry program will sunset July 1, 2008. The Judicial Council of California also regulates private conservators and guardians under existing Rules of Court. The Rules of Courts that relate to the education mandates of private guardians, Rule of Court 7.1010 (Exhibit B), and private conservators, Rule of Court 7.1060 (Exhibit C), will also sunset July 1, 2008.

In 2006, the Legislature passed a series of bills, including SB 1550, to provide a comprehensive scheme to regulate professional fiduciaries. SB 1550 created the Professional Fiduciaries Bureau (Bureau) to license and regulate professional fiduciaries under the Professional Fiduciaries Act (Act) to protect the public health, safety, and welfare. As part of the licensing program, the Bureau will assume responsibilities to provide specified information regarding professional fiduciaries to the courts and public and will regulate the education mandates of professional fiduciaries instead of Judicial Council. In addition, each professional fiduciary must pass an examination, earn 30 hours of precensing credits, and satisfy the other mandates of the Act for licensure.

In order to establish a program and give applicants a fair opportunity to become licensed before July 1, 2008, the Bureau must first develop an examination, which must involve testing of the legislatively mandated Code of Ethics. Furthermore, the Bureau must establish by regulation the education mandates, which lists approved education providers and courses. Since the examination requires sufficient time to develop, and since applicants should be given a reasonable amount of time to satisfy the 30 hours of precensing education requirement before July of next year, it is necessary for the Bureau to immediately adopt the proposed emergency regulations.

Emergency regulations will protect the public health, safety, and welfare.

## **SPECIFIC DESCRIPTION OF PROPOSED REGULATIONS**

This regulatory action adds Division 41 to Title 16 of the California Code of Regulations. Specifically, this regulatory action:

### Article 3. Precensing and Continuing Education

Adds Section 4440.

This section establishes the precensing education requirements for professional fiduciaries.

Adds Section 4442.

This section establishes the continuing education requirements for licensees.

Adds Section 4444.

This section sets the criteria for approved education courses for licensing.

Adds Section 4446.

This section recognizes education providers approved by the Bureau.

Adds Section 4448.

This section specifies the requirements for education providers.

Adds Section 4450.

This section defines proof of compliance for prelicensing credits.

Adds Section 4452.

This section defines proof of compliance for continuing education requirements.

#### Article 4. Code of Ethics

Adds Section 4470.

This section establishes general principles for the Code of Ethics.

Adds Section 4472.

This section specifies decision-making standards for professional fiduciaries acting on behalf of the client.

Adds Section 4474.

This section creates confidentiality standards to protect the personal matters of fiduciary clients.

Adds Section 4476.

This section establishes conflict of interest standards for the management of client affairs.

Adds Section 4478.

This section governs the decision-making process for determining the appropriate residential placement of the client.

Adds Section 4480.

This section establishes decision-making standards for determining the courses of care, treatment, and services that are in the best interest of the client.

Adds Section 4482.

This section establishes professional standards for the management of the client's estate.

Adds Section 4484.

This section governs the duties for limitation or elimination of fiduciary powers, including restoration of capacity, and specifies the duties to terminate the fiduciary relationship.

## **FISCAL IMPACT ESTIMATES**

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funds to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Costs to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: None

Local Mandates: None

Significant Adverse Impact on Businesses: None

Impact on Jobs/New Businesses:

The proposed education regulation will create an opportunity for existing education providers to expand course opportunities for professional fiduciaries and will create an opportunity for new instructors for both existing providers and new ones.

Cost Impact on Private Persons or Businesses Directly Affected:

The costs associated with this regulation only include those costs required to meet the education mandates for prelicensing and continued education. Out of the 600 to 1,000 estimated licensing population a portion of license applicants will have already met some or part of the prelicensing education requirements.

As one alternative, assuming that the applicant has not met any of the 30 hours of education credits required for prelicensing, three courses at California State Fullerton, Extended Program, would cost \$1,005.

To meet the ongoing 15 hours of education requirement each year, depending upon the courses taken, it could cost \$485 - \$625 per licensee, as determined at this time. It is possible that by the time that continuing education must be met, the marketplace will be more competitive, thus forcing costs of education down for licensees.

Effect on Housing Costs: None